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IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

UNITED STATES OF AMERICA,
Petitioner,

v.

COMMONWEALTH OF VIRGINIA, ET AL.,
Respondents.

COMMONWEALTH OF VIRGINIA, ET AL.,
Cross-Petitioners,

v.

UNITED STATES OF AMERICA,
Cross-Respondent.

On Writs of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF OF TWENTY-SIX PRIVATE WOMEN'S COLLEGES AS *AMICI CURIAE* IN SUPPORT OF PETITIONER*

WENDY S. WHITE
(Counsel of Record)
ANNE R. BOWDEN
AMY HORTON
KIM E. DETTELBACH
SHEA & GARDNER
1800 Massachusetts Ave., N.W.
Washington, DC 20036
(202) 828-2000

Attorneys for Amici Curiae

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*List of Signatory Colleges

Bennett College (NC)
Brenau Women's College (GA)
Chatham College (PA)
Chestnut Hill College (PA)
College of St. Benedict (MN)
College of St. Catherine (MN)
College of St. Elizabeth (NJ)
College of St. Mary (NE)
Columbia College (SC)
Hartford College for Women (CT)
Lesley College (MA)
Marymount College-Tarrytown (NY)
Midway College (KY)
Mount St. Mary's College (CA)
Mount Vernon College (D.C.)
Notre Dame College of Ohio
Pine Manor College (PA)
Russell Sage College (NY)
St. Mary's College (IN)
St. Mary-of-the-Woods College (IN)
Seton Hill College (PA)
Spelman College (GA)
Trinity College (D.C.)
Trinity College of Vermont
Ursuline College (OH)
Wilson College (PA)

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BRIEF OF *AMICI CURIAE* IN SUPPORT OF PETITIONER

STATEMENT OF INTEREST OF *AMICI CURIAE*

The twenty-six undersigned private women's colleges submit this brief as *amici curiae*, urging reversal of the decision of the court of appeals.[1]

These are all private women's colleges whose mission is to increase educational opportunities for women. The colleges have found, through their various activities and experiences, that women's colleges are particularly effective in preparing women for the many roles they will assume in life. Women's colleges offer an excellent academic education, challenge women to realize their full potential, and connect women into networks that will serve them during the course of their professional and personal lives. Single-gender education for women greatly increases the chances that a woman will succeed academically, pursue a career in a field traditionally associated with men, or assume a leadership role in society.

[1] The colleges signatory to this brief are: Bennett College (NC) Brenau Women's College (GA), Notre Dame College of Ohio, Chatham College (PA), Chestnut Hill College (PA), Pine Manor College (PA), College of St. Benedict (MN), Russell Sage College (NY), College of St. Catherine (MN), St. Mary's College (IN), College of St. Elizabeth (NJ), Seton Hill College (PA), College of St. Mary (NE), Spelman College (GA), Columbia College (SC), Trinity College (D.C.), Lesley College (MA), Trinity College of Vermont, Marymount College-Tarrytown (NY), Ursuline College (OH), Midway College (KY), Wilson College (PA), Mount St. Mary's College (CA), Mount Vernon College (D.C.), Hartford College for Women (CT), St. Mary-of-the-Woods College (IN). Pursuant to Rule 37.3 of the Rules of this Court, these colleges have filed with the Clerk the written consents of the parties in this case to the submission of this *amici curiae* brief.

According to literature compiled by an organization of women's colleges, 30% of the 50 women recognized as rising stars in corporate America by *Business Week* received their baccalaureate degree from a women's college. One-third of the women board members of the 1992 Fortune 1000 companies are women's college graduates. Of 54 women in Congress, 13 attended women's colleges. One of every seven women cabinet members in state government attended a women's college. Nearly three-quarters of all women's college graduates are in the work force, and almost half of those graduates hold traditionally male-dominated jobs, at the higher end of the pay scale, such as lawyer, physician or manager. Women's College Coalition, *A Profile of Recent College Graduates* (1993). In short, as summarized by Elizabeth Tidball, a pioneer in the field of evaluating the productivity of academic institutions with respect to women in science:

> "Graduates of women's colleges are more than twice as likely as graduates of coeducational colleges to receive doctorate degrees, and to enter medical school and receive doctorates in the natural sciences." M. Elizabeth Tidball, *Baccalaureate Origins of Entrance into American Medical Schools*, 57 Journal of Higher Education (1986).

The literature is persuasive that the intellectual development of women is enhanced when they have, at least, a few years to learn and study with each other in a single-gender environment. See, *e.g.*, Women's College Coalition, *A Profile of Recent College Graduates* (1993).

As a result of these colleges' focus on the benefits and promotion of single-gender higher education for women, they are particularly interested in this litigation involving the

Constitutionality of the all-male admissions policy of Virginia Military Institute ("VMI"). They submit the *amici* brief in this case not because they believe that a ruling here will have an impact on their own admissions policies, but in order to make clear that the result in this case would not have any such effect. VMI is a public institution; it has an admissions policy that limits enrollment to men; and it has a mission that perpetuates the traditional stereotype of men as soldiers, who learn from adversity, while women need "cooperative confidence building program[s]." *United States v. Virginia*, 44 F.3d 1229, 1234 (4th Cir.), *cert. granted*, 164 U.S.L.W. 3267 (Oct. 5, 1995). For all these reasons, the decision below, which provides that VMI may maintain its public status while continuing to exclude women applicants, should be reversed. A ruling that VMI cannot remain a public, all-male institution, however, does not in any way suggest that private women's colleges cannot continue to provide single-gender educational opportunities for women who choose to attend these institutions.

SUMMARY OF ARGUMENT

This case comes to this Court with a long history. In *United States v. Virginia*, 976 F.2d 890 (4th Cir. 1992) *("VMI I")*, *cert. denied*, 113 S. Ct. 2431 (1993), the court of appeals held that VMI's exclusion of women violated the Equal Protection Clause of the Fourteenth Amendment, and remanded the case to permit VMI to remedy this Constitutional violation. VMI could have chosen to open its doors to women - as have the U.S. military academies -or, as suggested by *VMI I*, to become a private college. Instead, VMI opted to create a separate and different leadership program for women, a program with a concededly different educational philosophy and disparate academic plan -- a program that lacked the tradition and stature of VMI. The

court of appeals approved this separate program in *United States v. Virginia*, 44 F.3d 1229 (4th Cir. 1995) *("VMI II")*.

In this Court, the Commonwealth of Virginia now challenges the initial determination that VMI's male-only admissions policy violates the Equal Protection Clause. The United States, on the other hand, seeks reversal of the decision to accept the VMI remedial plan. As we show below, the *VMI I* court correctly concluded that VMI's all-male admissions policy was unconstitutional, while in the *VMI II* Court erroneously ruled that the VMI remedy passed constitutional muster. Accordingly, *VMI II* should be reversed. It should be reversed because, under the Equal Protection Clause, a public institution cannot predicate its admissions policies on impermissible sexual stereotypes. For this reason, reversing *VMI II* would not impair the continued viability of private women's colleges. Such private institutions, unlike VMI, are not instrumentalities of the State, and operate to dissipate, rather than perpetuate, traditional gender classifications.

ARGUMENT

I. *VMI II* SHOULD BE REVERSED BECAUSE THE ALL-MALE PUBLIC MILITARY COLLEGE AND ITS PARALLEL "VWIL" PROGRAM, FAIL THE TEST OF *MISSISSIPPI UNIVERSITY FOR WOMEN v. HOGAN*.

A. A Single-Gender Public College May Not Rely on Stereotyped Generalizations about Men and Women in Justifying its Admissions Policy.

In *Mississippi University for Women v. Hogan*, 458 U.S. 718 (1982), this Court addressed the Constitutionality under

the Equal Protection Clause of the Fourteenth Amendment of "a state statute that exclude[d] males from enrolling in a state-supported professional nursing school." *Id.* at 719. As the Court there made clear, that case presented a "narrow issue," limited to the Constitutionality of a single-gender admissions policy that (l) was maintained by a state-supported university, and (2) excluded men from a nursing program. *Id.* Indeed, the Court explicitly left open in *Hogan* the question of whether excluding males from other programs at the University would violate the Fourteenth Amendment. *Id.* at 723 n.7.

Nevertheless, while the decision in *Hogan* was tailored to its facts, this Court there articulated the Constitutional standard for reviewing the validity of single-gender admissions policies of public colleges and universities. That standard requires that a party seeking to uphold a statute that classifies individuals on the basis of their gender must show an "'exceedingly persuasive justification'" for the classification. *Id.* at 724 (citation omitted). At the least, this showing is met by demonstrating that "the classification serves 'important governmental objectives and that the discriminatory means employed' are 'substantially related to the achievement of those objectives.'" *Id.* (citation omitted).

The *Hogan* Court went on to emphasize that in order for those objectives to survive Constitutional scrutiny, they must avoid the perpetuation of traditional gender stereotypes:

> "Although the test for determining the validity of a gender-based classification is straightforward, it must be applied free of fixed notions concerning the roles and abilities of males and females. Care must be taken in ascertaining whether the statutory objective itself reflects archaic and stereotypic notions. Thus, if the statutory objective is to exclude or 'protect' members of one gender because they are presumed to suffer from an inherent handicap or to be innately inferior, the objective itself is illegitimate." *Id.* at 724-25 (citation and footnote omitted).

VMI cannot satisfy this Constitutional undertaking. The Commonwealth of Virginia argues that the male-only admissions policy at VMI is justified by the Commonwealth's objective belief in the pedagogical value of a single-gender education and in its legitimate interest in providing a diversity of opportunities in its higher education offerings. Cross-Pet. at 4-5. It further asserts that the policy of limiting VMI admission to only one gender is narrowly tailored to achieving the benefits that a single-gender education provides. *Id.* at 5. Alternatively, it argues that VMI's gender restrictive admissions policy is "directly related to achieving the results of an adversative method in a military environment," because "'the unique characteristics of VMI's program would be destroyed by coeducation.'"[2] *Id.* at 6.

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[2] As the dissent recognized in the decision below, there is reason to question whether any of these purported justifications provide the real basis for the male-only admissions policy. Inquiry into the history and actual purpose of VMI's discriminatory admissions policy and proposed remedial action plan would support the conclusion that the primary and overriding purpose is "not to create a new type of educational opportunity for women, nor to broaden the Commonwealth's educational base for producing a special kind of citizen-soldier leadership, nor to further diversify the Commonwealth's higher education system . . . but is simply by this means to allow VMI to continue to exclude women in order to preserve its historical character and mission as that is perceived and has been primarily defined in this litigation by VMI and directly affiliated parties." *VMI II*, 44 F.3d at 1247 (Phillips, J., dissenting) (footnote omitted). Even if the asserted reasons are credited, however, the policy still fails to pass constitutional muster.

None of these formulations of the justification for providing military training for men and not for women can serve an "important governmental objective." As this Court recognized in *Hogan*, no gender-based classification can be justified on the ground that it provides a benefit or choice not available to the other gender. *Id.* at 731 n.17. In the words of this Court:

> "The issue is not whether the benefitted class profits from the classification, but whether the State's decision to confer a benefit only upon one class by means of a discriminatory classification is substantially related to achieving a legitimate and substantial goal." *Id.*

Thus, VMI's male-only admissions policy cannot be supported on the ground that it provides a "unique" educational opportunity for men or that it offers diversity in educational opportunities, because a State cannot generally have as an important governmental objective the provision of a program to members of only one sex.

This is not to say, as this Court held, that gender-based classifications favoring one sex can never be justified. "In limited circumstances, [such] a gender-based classification favoring one sex can be justified if it intentionally and directly assists members of the sex that is disproportionately burdened." *Id.* at 728. Just as the nursing program at Mississippi University for Women could not meet this standard, so the military program at VMI cannot be so justified. Indeed, VMI's policy of excluding women from admission to its military program, and its bases for doing so, expressly perpetuate the stereotyped view that only men are capable of rigorous military training. In short, it could hardly be said that men should be favored in military training as a result of past discrimination in this field.

Finally, VMI makes the argument that homogeneity of gender is, in itself, a legitimate and important governmental objective because it is necessary to "achieving the results of an adversative method in a military environment." Cross-Pet. at 6. In so contending, the Commonwealth has confused means and ends. The Commonwealth cannot contend that using the adversative method is, in itself, an important governmental objective. At best, it can argue that using the adversative method is substantially related to the important government objective of training "citizen-soldiers."[3] But even assuming the Commonwealth has shown that the adversative method is narrowly tailored to the legitimate goal of training citizen soldiers, and that homogeneity of gender is necessary to implement that methodology, the Commonwealth still must justify its decision to provide such training only to those men who desire it and not also to those individual women who share this desire. Moreover, it must do so without relying on stereotypical notions of the proper roles and abilities of men and women or on generalizations about the attitudes or preferences of men or of women as a group. Since the Commonwealth has not made and cannot make such a showing, its decision to deny women the unique benefits of a VMI education available to men cannot survive constitutional scrutiny.

Accordingly, under any of its purported justifications, VMI fails the *Hogan* standard for maintaining single-gender, state-supported colleges and universities.

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[3] This assumption is, itself, subject to considerable debate. VMI's own mission statement defines citizen soldiers as "educated and honorable men who are suited for leadership in civilian life and who can provide military leadership when necessary." *VMI I*, 976 F.2d at 893. By all accounts, the United States military academies have continued to enjoy considerable success in training men and women as "citizen-soldiers" even though they have abandoned the use of the adversative method as a training tool.

B. The Remedy Proposed by VMI Violates the Equal Protection Clause Because it Justifies Differential Treatment of Men and Women with Reference to Gender-Based Stereotypes.

In *VMI I*, the court of appeals found that the failure of the Commonwealth to offer women benefits comparable to those offered to men at VMI constituted a violation of the Equal Protection Clause. The *VMI I* court, however, did not order that VMI become a coeducational college. Rather, it remanded the case to the district court, directing the Commonwealth to formulate, adopt, and implement a remedial plan. The remedial plan for the equal protection violation offered by the Commonwealth, and later affirmed by the court of appeals in *VMI II*, was to create a separate single-gender, state-supported leadership training institute (the "Virginia Women's Institute for Leadership" or "VWIL") at Mary Baldwin College for women seeking to be trained as "citizen-soldiers." This program, all parties agree, shuns the adversative method of education and relies, instead, on educational and social methodologies wholly different from those used at VMI.

This remedial plan, however, fails to rectify the Constitutional infirmity of the Commonwealth's single-gender admissions policy at VMI. This Court has never ruled on the Constitutionality of separate but equal educational facilities for men and women, having soundly rejected the propriety of such sepa
rate education in the context of race.[4] However, when separate educational facilities for the races were tolerated, they were permitted if and only if they were substantially

[4] See *Brown* v. *Board of Education*, 347 U.S. 483, 495 (1954) ("Separate educational facilities are inherently unequal.").

equal on all relevant tangible and intangible criteria by which educational institutions are evaluated. See, *e.g.*, *Sweatt v. Painter*, 339 U.S. 629, 633-34 (1950) (finding separate state-supported law schools for blacks and whites intolerable where tangible resources such as library size and intangible resources such as position and influence of alumni and prestige were not substantially equivalent).

In this case, it is clear that requiring women who seek training as "citizen-soldiers" to attend the VWIL, while permitting men who seek such training to attend VMI, does not treat men and women substantially equally. The VWIL falls far short of VMI in its breadth of curricular offerings, endowment, reputation, facilities, strength of alumni networks, and prestige. As Judge Phillips concluded in his dissenting opinion in *VMI II*:

> "[T]he contrast between [VMI and the VWIL] on all the relevant tangible and intangible criteria is so palpable as not to require detailed recitation. If every good thing projected for the VWIL program is realized in reasonably foreseeable time, it will necessarily be then but a pale shadow of VMI in terms of the great bulk, if not all of those criteria." *VMI II*, 44 F.3d at 1250 (Phillips, J., dissenting).

Moreover, whether or not this Court were to hold the "separate but equal" jurisprudence to be applicable to the maintenance of single-gender education, it is conceded here that under the proposed remedial plan, men and women will be treated differently. Specifically, while VMI will continue to provide men the opportunity to receive a state-supported military style education using the adversative method, the very tool that the Commonwealth has represented to be essential to achieving VMI's leadership training goals,

women admitted to the VWIL will not enjoy that opportunity to develop the same leadership skills and to receive the same educational benefits.

As the *Hogan* Court made clear, in order for this disparity in treatment between men and women to survive equal protection scrutiny, it must be supported with an "exceedingly persuasive justification." In this case, however, the only justification that the Commonwealth has offered to explain this disparity eviscerates this Court's equal protection authority by incorporating and relying on the very gender stereotyping that this Court's jurisprudence forbids. Thus, the Commonwealth asserted, and the court of appeals affirmed, that the decision not to offer a VMI style education at the VWIL was motivated by the belief that "aspects of VMI's military model, especially the adversative method, would not be effective for women as a group, even though . . . some women would be suited to and interested in experiencing a 'women's VMI.'" *VMI II*, 44 F.3d at 1233-34. This group perception of women is precisely what the Constitution rejects. As Justice Kennedy recently explained in his concurring opinion in *J.E.B. v. Alabama*, 114 S. Ct. 1419, 1434 (1994):

> "The neutral phrasing of the Equal Protection Clause, extending its guarantee to 'any person,' reveals its concern with rights of individuals, not groups . . . . 'At the heart of the Constitution's guarantee of equal protection lies the simple command that the Government must treat citizens as individuals, not as simply components of a racial [or] sexual . . . class.'"

Consequently, in relying on assumptions about women as a group, while acknowledging that individual women may behave differently than the stereotyped model predicts, the

court of appeals below erroneously approved the VMI remedial plan, and its decision should be reversed.

II. THE REVERSAL OF *VMI II* WOULD NOT UNDERMINE OR THREATEN THE MAINTENANCE OF PRIVATE WOMEN'S COLLEGES.

In *VMI I*, the court of appeals, recognizing that VMI's male-only admissions policy violated the Equal Protection Clause, directed the Commonwealth to develop and implement a solution to remedy the equal protection violation. Three options were presented. The court held that Virginia "might properly decide to admit women to VMI and adjust the program to implement that choice, or it might establish parallel institutions or parallel programs, or it might abandon state support of VMI, leaving VMI the option to pursue its own policies as a private institution." *VMI I*, 976 F.2d at 900. As demonstrated above, the development of parallel institutions or programs failed to pass constitutional muster. As we show below, the third option -- going private -- could have provided a remedy.

A. The Equal Protection Clause Does Not Apply to Private Single-Gender Colleges and Universities.

That the Fourteenth Amendment "erects no shield against merely private conduct" and inhibits "only such action as may fairly be said to be that of the States" are principles that have been "embedded in our constitutional law" since 1883. *Shelley v. Kraemer*, 334 U.S. 1, 13 (1948) (referring to the *Civil Rights Cases*, 109 U.S. 3 (1883)). Equal protection jurisprudence since that time has established that the application of the Equal Protection Clause to actions taken by educational institutions depends, first, on whether the

institutional actor is "private," and second, on whether the action taken by the institution may "be fairly attributable to the State." *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 937 (1982).

The factors that determine whether a college or university is public or private are well-settled by this Court. See *Trustees of Dartmouth College v. Woodward*, 17 U.S. (4 Wheat.) 518 (1819). In *Dartmouth College*, this Court found that neither the national interest in education nor New Hampshire's incorporation of the college transformed Dartmouth into a public entity. Rather, the college's charter established its status as a private educational institution by demonstrating that the college was founded by a private citizen, funded through a private endowment, and governed by a privately appointed board of trustees. The features that led the Court to conclude that Dartmouth was a private institution -- its origin, its sources of financial support, and its governing structure -- remain the hallmarks of private colleges and universities today.[5]

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[5] See *Rendell-Baker v. Kohn*, 457 U.S. 830, 831-32 (1982) (school was founded as a private institution, incorporated as a nonprofit entity, located on private property, and governed by a private board of directors who were not selected by public officials); *Board of Trustees for Vincennes Univ. v. Indiana*, 55 U.S. (14 How.) 268, 276-77 (1852) (college that was governed by a privately appointed board of trustees was not a public institution, subject to the state's control, even though it was located on land donated by Congress to be held in trust by the State for the creation of an educational institution; *Pime v. Loyola Univ. of Chicago*, 803 F.2d 351, 352, 357 (7th Cir. 1986) (university was founded by religious order, incorporated as a nonprofit entity, and governed by a president and private board of trustees, a specified number of whom were required to be members of the founding order) (Posner, C.J., concurring). *Cf., Braden v. University of Pittsburgh*, 552 F.2d 948, 959-61 (3d Cir. 1977) (former private university was transformed into "state-related institution" as a result of legislative "'comprehensive restructuring'" of the university that granted elected officials the power to (continued...)

The recognition of a college or university as private, however, may not completely shield it from application of the Equal Protection Clause. Where the State "has exercised coercive power or has provided such significant encouragement, either overt or covert" over the suspect action of the institution, that action may be deemed "state action," subject to the requirements of the Fourteenth Amendment. *Blum v. Yaretsky*, 457 U.S. 991, 1004 (1982).

This Court has enunciated various tests or factors for determining whether a particular action taken by a private institution constitutes state action. *Edmondson Oil*, 457 U.S. at 939. For example, the "public function" test asks whether the State has endowed "private individuals or groups . . . with powers or functions [that are] governmental in nature," such that the private groups act as "agencies or instrumentalities of the State" itself. *Evans v. Newton*, 382 U.S. 296, 299 (1966) (maintenance of white-only city park under private trusteeship involved State action). The "close nexus" test looks at the link between the particular challenged action and the State to see if the challenged action is "compelled" or "influenced" by the State. *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 350-51 (1974) (state action not established when State regulation of a public utility was unrelated to employee termination); *Rendell-Baker v. Kohn*, 457 U.S. 830, 841 (1982) (state action not established when State and local regulation of private high school was not related to teacher's dismissal). The "symbiotic relationship" test directs attention to the "interdependence" between the private entity and the State to examine whether the State has "place[d] its power,

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[5] (...continued)
appoint trustees and name certain public officials as *ex officio* trustees, gave the state widespread regulatory control over all fiscal matters and management, and dedicated public monies to support the university).

property and prestige" behind the challenged action. *Burton v. Wilmington Parking Auth.*, 365 U.S. 715, 725 (1961) (racially discriminatory service of restaurant located in publicly owned and operated parking garage constituted State action). Whether these "tests are actually different in operation or simply different ways of characterizing the . . . inquiry" in different factual circumstances, they all seek to distinguish routine involvement by the State in the affairs of a private entity from involvement that constitutes the "something more" necessary to convert the private entities' action into that of the State. *Edmondson Oil*, 457 U.S. at 939.

Regardless of which state action test is applied in a given case, the Court has encouraged "[c]areful adherence" to the state action requirement. *Edmondson Oil*, 457 U.S. at 936. That advice is particularly critical in the context of equal protection analyses involving private colleges and universities, where an ill-considered finding of state action "might incidentally contribute to the erosion of the autonomy and diversity of private colleges and universities." *Berrios v. Inter American Univ.*, 535 F.2d 1330, 1333 (1st Cir. 1976). Accordingly, courts have assiduously and wisely avoided a broad interpretation of state action in cases involving private institutions of higher education.

For example, courts have consistently followed *Dartmouth College's* holding that the registration, certification, or incorporation of the private entity by the State does not transform the private entity into a state actor.[6] They have also uniformly held that the "mere

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[6] See e.g., *McKeesport Hosp. v. Accreditation Council*, 24 F.3d 519, 527 (3d Cir. 1994); *Yeager v. City of McGregor*, 980 F.2d 337, 342 n.9 (5th Cir.), (continued...)

offering of an education, regulated by the State," does not imbue private action with sufficient public interest to render it governmental in nature. *Krohn v. Harvard Law School*, 552 F.2d 21, 24 (1st Cir. 1977). In *Rendell-Baker*, 457 U.S. at 842, for example, legislation that guaranteed public funding to educate maladjusted high school students did not make such specialized education "the exclusive province of the State."[7]

Courts have, in addition, found that considerable regulation by the State does not compel application of the Equal Protection Clause to private educational institutions. The private school at issue in *Rendell-Baker*, for example, was subject to substantial regulation by a number of public entities, including local school committees, the State Drug Rehabilitation Division and other state agencies. *Rendell-Baker*, 457 U.S. at 833. Similarly, the university in *Inter American University*, 535 F.2d at 1332, was subject to regulations of the state accrediting council as well as other regulations applicable to institutions of higher education. The mere regulation of these entities by public bodies, however, was "not sufficient" to render the institutions state

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[6] (...continued)
cert. denied, 114 S. Ct. 79 (1993); *Cohen v. Illinois Inst. of Technology*, 524 F.2d 818, 824 (7th Cir. 1975), *cert. denied*, 425 U.S. 943 (1976); *Blouin v. Loyola Univ.*, 506 F.2d 20, 21-22 (5th Cir. 1975); *Blackburn v. Fisk Univ.*, 443 F.2d 121, 123 (6th Cir. 1971); *Powe v. Miles*, 407 F.2d 73, 80 (2d Cir. 1968).

[7] *Accord Inter American Univ.*, 535 F.2d at 1333 ("[h]igher education is not generally regarded as exclusively a function 'traditionally associated with sovereignty'") (citations omitted); *Fisk Univ.*, 443 F.2d at 124 (same); *Ben-Yonatan v. Concordia College Corp.*, 863 F. Supp. 983, 987 (D. Minn. 1994) (same).

actors.[8] *Rendell-Baker*, 457 U.S. at 842; *Inter American Univ.*, 535 F.2d at 1332.

Finally, courts have routinely held that institutions that enjoy tax-exempt status[9] or receive public money in the form of loan guarantees, scholarships, or grants,[10] are not, by virtue of their receipt of these public funds, transformed into state actors.[11] Indeed, even where the public funds received by the private entity are substantial, courts have declined to

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[8] *Accord Moose Lodge No. 107 v. Irvis*, 407 U.S. 163, 173 (1972); *Cohen*, 524 F.2d at 826; *Powe*, 407 F.2d at 81; *Stone v. Dartmouth College*, 682 F. Supp. 106, 108 (D.N.H. 1988); *Blum*, 457 U.S. at 1011.

[9] See, *e.g.*, *New York City Jaycees, Inc. v. United States Jaycees, Inc.*, 512 F.2d 856, 859 (2d Cir. 1975) (tax exemption "'creates only a minimal and remote involvement'" by the government in the exempt entity's activities) (citations omitted); *Browns v. Mitchell*, 409 F.2d 593, 595-96 (10th Cir. 1969) (tax exempt status does not render institution a state actor); *Fischer v. Driscoll*, 546 F. Supp. 861, 865 (E.D. Pa. 1982)(same).

[10] See, *e.g.*, *Inter American Univ.*, 535 F.2d at 1332 (university that participated in state student aid program was not found to be a state actor); *Loyola Univ.*, 506 F. 2d at 21; (fact that private university received "substantial federal and state monies in the form of grants, subsidies, student scholarships, and loans" did not support a finding of state action); *Greenya v. George Washington Univ.*, 512 F.2d 556, 561 (D.C. Cir.) ("direct grants, loans, or loan guarantees" were not sufficient to establish state action by otherwise private university), *cert. denied*, 423 U.S. 995 (1975).

[11] See also *McKeesport Hosp.*, 24 F.3d at 527 (public funds); *Yeager*, 980 F.2d at 342 n.9 (same); *Krohn*, 552 F.2d at 24 (public funds and tax exempt status); *Lorentzen v. Boston College*, 440 F. Supp. 464, 465 (D. Mass. 1977) (public funds and tax exempt status), *aff'd*, 577 F.2d 720 (1st Cir. 1978), *cert. denied*, 440 U.S. 924 (1979); *Cohen*, 524 F.2d at 825 (public funds); *Fisk Univ.*, 443 F.2d at 123 (public funds and tax-exempt status); *Gonyo v. Drake Univ.*, 879 F. Supp. 1000, 1006 (S.D. Iowa 1995) (public funds); *Ben-Yonatan*, 863 F. Supp. at 987 (state and federal financial support); *Grossner v. Trustees of Columbia Univ.*, 287 F. Supp. 535, 546-48 (S.D.N.Y. 1968) (public funds).

find state action. The private school's dismissal of teachers without due process in *Rendell-Baker*, for example, did not constitute state action in spite of the fact that the school received "virtually all of [its] income" from various state agencies. *Rendell-Baker*, 457 U.S. at 840. Similarly, the university's conduct in *Imperiale v. Hahnemann University*, 776 F.Supp. 189, 198 & n.4 (E.D. Pa. 1991), *aff'd*, 966 F.2d 125 (3d Cir. 1992), did not constitute state action even though the university received "'substantial infusions of state funds'" which were "clearly of great importance to it." (Citation omitted.) Thus, it is clear that the mere receipt of government loans or funding "is not, without a good deal more, enough to make the recipient an agency or instrumentality of the Government." *Grossner v. Trustees of Columbia Univ.*, 287 F. Supp. 535, 548 (S.D.N.Y. 1968).[12]

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[12] *Norwood v. Harrison*, 413 U.S. 455 (1973), had a different result. In *Norwood*, this Court found that the state's financial aid in the form of the provision of textbooks to private elementary and secondary schools that discriminated on the basis of race constituted state action. A canvas of the state action cases since *Norwood*, however, indicates that the Court's broad reading of the state action doctrine in that case has been limited to circumstances in which the challenged action involves invidious racial discrimination. As one court noted, "'racial discrimination is so peculiarly offensive and was so much the prime target of the Fourteenth Amendment that a lesser degree of involvement may constitute 'state action' with respect to it than would be required in other contexts.'" *George Washington Univ.*, 512 F.2d at 560 (finding that federal funding for a private university's programs and capital expenditures did not constitute state action where the challenged action was the termination of employment of an instructor without due process and in violation of his First Amendment rights) (citation and footnote omitted). While courts have found that even minimal aid to a private racially discriminatory institution triggers application of the Equal Protection Clause, see *id.*, 512 F.2d at 560 n.6 (collecting cases in which racial discrimination by a private entity constituted state action and contrasting these cases to state action determinations that went the other way in other contexts), they have, at the same time, developed and applied the state action tests discussed above in circumstances that do not involve racial

(continued...)

In sum, courts have consistently held, under one or another formulation of the state action test, that the actions of private colleges and universities are not considered those of the State simply because such institutions provide educational services, are regulated by the State, enjoy tax-exempt status, or receive state services or funding. Something more -- the assumption by the private entity of functions which are traditionally governmental in nature or State involvement that compels or supports the challenged private action -- is required. *Edmonson Oil*, 457 U.S. at 939. Consequently, the single-gender admissions policies of private colleges, which serve no governmental function and are not compelled by or related to the State, are not governed by the Equal Protection Clause. This means that if VMI could abandon its state-related public status, it could maintain its single-gender policy.

B. The Tax-Exempt Status of Private Women's Colleges Is Not Threatened by the Public Policy Requirement Enunciated in *Bob Jones University v. United States*.

Just as the Equal Protection Clause does not prohibit private colleges from maintaining single-gender admissions policies, federal tax regulations cannot force them to close their doors. *Bob Jones University v. United States*, 461 U.S. 574 (1983) does not suggest otherwise.

In *Bob Jones*, this Court affirmed the Internal Revenue Service's denial of tax-exempt status to two private colleges

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[12] (...continued)
discrimination. Those tests, as demonstrated herein, establish that the receipt of even substantial and essential public funding does not render an otherwise private action that of the State.

that maintained racially discriminatory enrollment policies. The Court's analysis there began with the determination that Congress, in enacting the Internal Revenue Code, intended that tax-exempt institutions must, in addition to fitting into one of the categories enumerated in the relevant Code provisions, "serve a public purpose and not be contrary to established public policy." *Id.* at 586. This Court then found that racial discrimination in education violates "a most fundamental national public policy." *Id.* at 593. Private colleges that practice racial discrimination cannot, it followed, enjoy tax-exempt status.

While there is no doubt that the racially discriminatory policies espoused by the two institutions in *Bob Jones* "violate[d] deeply and widely accepted views of elementary justice," *id.* at 592, this Court's threshold determination that tax-exempt institutions must "demonstrably serve and be in harmony with the public interest," *id.*, met with some skepticism, even among the members of the Court.[13] Critics charged that the Court had given little guidance regarding the scope and application of the public policy requirement and warned that the *Bob Jones* opinion might herald a new era in which private institutions would be required to conform with mainstream ideology in order to retain their tax-exempt status.[14]

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[13] See *Bob Jones*, 461 U.S. at 608 (Powell, J., concurring) ("I am unconvinced that the critical question in determining tax-exempt status is whether an individual organization provides a clear 'public benefit.'"); *id.* at 618 (Rehnquist, J., dissenting)("I reject the Court's heavyhanded creation of the requirement that an organization seeking [tax-exempt] status must '"serve and be in harmony with the public interest."') (citation omitted).

[14] See, *e.g.*, Note, *The Independent Sector and the Tax Laws: Defining Charity in an Ideal Democracy*, 64 S. Cal. L. Rev. 461, 476, 477, 478 (1991)(noting the "uncertainty of the [*Bob Jones*] decision" in which "the (continued...)

Yet *Bob Jones* has had no such impact. Neither the IRS nor the lower courts have read the decision as an invitation to apply the public policy requirement to deny tax exemptions in circumstances beyond those that closely parallel the circumstances encountered in *Bob Jones*.[15]

That the *Bob Jones* public policy requirement has fostered limited change in the status of tax-exempt

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[14] (...continued)
reach of [the public policy] test was not clarified," and speculating that *Bob Jones* may "result in the compromise of the pluralistic character of our charitable organization structure" and lead to "arbitrary and narrow determinations that in turn will defeat freedom of choice"); Steven R. Swanson, *Discriminatory Charitable Trusts: Time for a Legislative Solution*, 48 U. Pitt. L. Rev. 153, 165 (1986)(noting that the "*Bob Jones University* test . . . probably will not provide a satisfactory solution to the problem" of deciding whether an activity violates public policy); Francis R. Hill and Barbara L. Kirschten, *Federal and State Taxation of Exempt Organizations* § 2.03[6] (1994) (noting "the absence of specific guidance" in the area of public policy requirements for tax-exempt organizations and warning tax advisors to proceed with "extreme caution"); *Bob Jones*, 461 U.S. at 612, 609 (Powell, J., concurring) (observing that the *Bob Jones* holding left unanswered "[m]any questions" such as "whether organizations that violate other policies should receive tax-exempt status" and that the public policy requirement "ignores the important role played by tax exemptions in encouraging diverse, indeed often sharply conflicting, activities and viewpoints").

[15] The IRS and courts have tended to limit their application of the *Bob Jones* public policy requirement to the context of racial discrimination. See, *e.g.*, IRS Priv. Ltr. Rul. 8910001 (Nov. 30, 1988) (denying exempt status to trust limiting its beneficiaries to "worthy and deserving white persons" over the age of 60); *Virginia Educ. Fund v. Commissioner*, 85 T.C. 743 (1985) (revoking tax-exempt status of a fund for racist private schools), *aff'd*, 799 F.2d 903 (4th Cir. 1986); *Prince Edward School Found. v. Commissioner*, 478 F. Supp. 107 (D.D.C. 1979) (revoking tax exempt status of nonprofit private elementary school and high school due to racist policies), *aff'd mem.* (D.C. Cir. 1980), *cert. denied*, 450 U.S. 944 (1981).

organizations is not surprising in light of the constraints on the requirement set forth in the opinion. This Court warned that the determination of public policy is a "sensitive matter[] with serious implications for the institutions affected" and repeatedly cautioned that a declaration that a private institution contravenes public policy should be made "only where there is no doubt that the organization's activities violate fundamental public policy." *Bob Jones*, 461 U.S. at 592, 598. It acknowledged that its lack of doubt that racial discrimination violated public policy was singular, noting that "[f]ew social or political issues in our history have been more vigorously debated and more extensively ventilated." *Id.* at 595. Finally, it clearly set forth the basis for its determination that racial discrimination by educational institutions violates public policy: an "unmistakably clear" concordance between "all three branches of the Federal Government" (*id.* at 598) that racial discrimination must be eradicated, manifested by an "unbroken line of [this Court's] cases" and "myriad Acts of Congress and Executive Orders" spanning over a quarter-century. *Id.* at 593.

The single-gender admissions policies of private colleges thus are not jeopardized by the *Bob Jones* public policy requirement. The three branches of the federal government have not, acting independently or in concert, articulated a position against, much less launched a crusade to dismantle, private single-sex colleges. No court has questioned the constitutionality of private undergraduate single-gender colleges or drawn any adverse conclusions about the pedagogical or social worth of single-gender educational opportunities. No statement or order by the executive branch has condemned the policies offered by such institutions to justify their place in the educational marketplace. And Congress has passed no law that undermines the viability or questions the value of single-sex private higher education.

Indeed, the clearest evidence that the federal government considers private single-gender colleges worthy of preserving is Title IX of the Education Amendments of 1972. 20 U.S.C. §§ 1681 *et seq.* Title IX, which prohibits sex discrimination "under any education program or activity receiving Federal financial assistance," specifically exempted from its purview private institutions of undergraduate higher education. 20 U.S.C. § 1681(a)(1).[16] Thus, while Congress assured that both males and females would have equal educational opportunities at public and private professional, graduate, and vocational schools and public undergraduate schools, it specifically recognized that private institutions offering single-gender undergraduate educational opportunities should be preserved.

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[16] Section 1681(a)(1) provides:

> "No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance, except that ... in regard to admissions to educational institutions, this section shall apply only to institutions of vocational education, professional education, and graduate higher education, and to public institutions of undergraduate higher education."

Thus, § 1681(a)(1) of Title IX excludes the admissions policies of single-gender private colleges altogether. By contrast, § 1681(a)(5) governs single-gender public institutions and grandfathers "any public institution of undergraduate higher education which is an institution that traditionally and continually from its establishment has had a policy of admitting only students of one sex."

Accordingly, while the creation of a new single-gender public college is prohibited by § 1681(a)(5) of Title IX, since such a new institution could not be "grandfathered," a new private single-gender college may be established today without violating the statute.

In short, there is no "fundamental public policy" or "declared position of the whole Government" which the maintenance or establishment of private single-gender undergraduate college programs contravenes. *Bob Jones*, 461 U.S. at 594, 599. Moreover, whatever the pedagogical evidence, if any, supporting single-gender education for males, the evidence is clear and well-established that single-sex education for women is particularly effective in preparing them for leadership and success, generally, and in male-dominated fields, more particularly. See Statement of Interest, *supra*. A private VMI, then, like private women's colleges, would enjoy tax-exempt status as long as it could show - as women's colleges can - a valid pedagogical purpose consistent with public policy.

CONCLUSION

For the reasons set forth above, *VMI II* should be reversed. It should be reversed because VMI is a public institution that does not pass constitutional muster under the standard articulated in *Mississippi University for Women*, and as a public, state-supported college it must meet that standard. In reversing *VMI II*, however, the Court should make clear that the demise of VMI's male-only admissions policy does not undermine the strength and viability of private women's colleges.

Respectfully submitted,

Wendy S. White *
Anne R. Bowden
Amy Horton
Kim E. Dettelbach
Shea & Gardner
1800 Massachusetts Ave., N.W.
Washington, D.C. 20036-1872
(202) 828-2000

Attorneys for the Amici Curiae
Twenty-six Private Women's Colleges

* Counsel of Record

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